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The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press

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The ABA has proposed a new Standard for the Prosecution Function, Standard 3-1.7, which addresses how prosecutors should communicate with the media. The core portion of that proposal prohibits a prosecutor from making a statement raising a substantial risk of materially prejudicing a criminal proceeding or of unnecessarily heightening public condemnation of the accused. But this proposal is unrealistic. Recent findings in cognitive science suggest that media information overload and its fast pace result in media coverage of high-profile trials that heightens audience's negative emotions while compromising their critical faculties. Audience members thus are enraged at accused offenders and ill-equipped to judge the accuracy and completeness of media crime stories. All media in such cases therefore raise the substantial risks that the proposal prohibits. On the other hand, prosecutors' commentary to the press serves important free speech and political purposes, which this Article details. This Article weighs this balance to come up with an alternative series of guiding ethical principles, including, centrally, the principle that the prosecutor's statements shall not aggravate the unavoidable risks posed to trial fairness. The remaining principles detail how to give this nonaggravation rule greater specificity in channeling prosecutors' ethical decisionmaking in communicating with the media.

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INTRODUCTION

I have been asked for this project to comment on the proposed new ABA Criminal Justice Standards for the Prosecution Function, specifically Standard 3-1.7, entitled "Relationship with the Media."[1] Standard 3-1.7 has as its core provision a declaration that the "prosecutor

1. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(c) (Proposed Revisions 2010).

should not make or authorize the making of a public statement that the prosecutor reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or unnecessarily heightening public condemnation of the accused...."[2] The sole exception to this mandate is for "statements that are necessary to inform the public of the nature and extent of the prosecutor's or law enforcement actions and which serve[] a legitimate law enforcement purpose (and subject to any exceptions in an applicable judicial rule or rule of professional conduct)."[3]

The Standard also contains a number of other provisions, but they are all ones that I see as playing a merely supportive role to the core provision quoted above.[4] My focus, therefore, in Part I of this Article, will be on the core provision's "substantial risk" language, which has been favorably described by the U.S. Supreme Court.[5] The same language also appears in the Model Rules of Professional Conduct.[6] My argument here, however, is that the Standard is an unrealistic one in high-profile cases, because the described risks to the suspect's reputation and to his receiving a fair trial *always* exist and are always substantial.

Innovations in technology and the fast-paced modern lifestyle, combined with changes in the structure of modern media, make the public more likely to attend to and be deeply affected by dramatic, anti-defendant media coverage—the kind of coverage most often embraced by the media. Empirical data suggest that this coverage always raises a substantial *risk* of negatively impacting jury verdicts.[7] Those verdicts thus become based more on bias and presupposition than careful deliberation, as Part I explains. The verdicts also stigmatize—or, "unnecessarily heightening public condemnation of the accused"—defendants, even those who are later acquitted, as Part II explains.

Part III, however, looks at the other side of the equation: free speech values. Part III concludes that all high-profile trials are political, thus having expressive value for both speech by the parties and coverage by the press. These free speech values include debating the status of salient social groups, such as those based upon race or sex, offering morality plays to confirm or refute social norms, allowing the jury to bring political values (lawmaking) into the courtroom, aiding in "governing by crime" or rejecting it, furthering debate in the court of public opinion, and promoting individual and collective self-rule.

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2. *Id.*

3. *Id.*

4. *See id.* § 3-1.7(d)–(g).

5. *See* Gentile v. State Bar, 501 U.S. 1030, 1077 (1991); *see also infra* text accompanying notes 183–196.

6. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 (2010).

7. *See infra* text accompanying notes 9–51.

Part III.B examines more closely the expressive role of trial lawyers, with emphasis on elected prosecutors, who have special free speech functions given their role as perennial candidates for political office. Prosecutors have a legitimate responsibility to keep the electorate advised of certain classes of prosecutor activity, management of resources, and policies, including those concerning some aspects of specific cases. They also have a right to respond to prejudicial defense statements to the press and to the media's own inaccurate coverage.

The Article concludes that prosecutors can serve their special expressive role and the political functions of high-profile trials adequately in ways that limit the danger to a fair trial. Because the Standards are aspirational,[8] I articulate several broad guiding principles for redrafting them. Primary among them is the principle of nonaggravation, that is, that prosecutors should not make statements that will aggravate any inevitable risk of unfairness stemming from media coverage or defense press statements. Rather, prosecutors should speak primarily to mitigate such unfairness. They may also speak to advise the public of their actions in a case or to protect public safety. Otherwise, prosecutors should be silent. The choice is a difficult and close one, however, requiring a balance of competing values.

I caution readers that in this brief Article, I cannot treat these matters thoroughly. My aim, however, is to prompt discussion and debate, which may sharpen the thinking of the ABA's Task Force on the revisions to the Standards. That, as I understand it, is the primary goal of the nationwide roundtable discussions on the proposed Standards. It is, in any event, my modest goal in the pages to follow.

I. INFORMATION OVERLOAD AND ITS CONSEQUENCES IN A HIGH-TECH, FAST-PACED WORLD

Our high-tech, fast-paced modern culture overstimulates emotional responses to overwrought, negative, and shallow crime news coverage. These same factors compromise our ability, and thus that of jurors, to critique poor news coverage effectively, while also reducing the empathy that ordinary people and jurors need to judge another person fairly. This Part of the Article reviews the empirical data supporting these claims, concluding that media coverage of trials always creates a *substantial risk* of materially prejudicing a criminal proceeding, thus rendering any embrace of the substantial risk test unrealistic.

A. EMOTIONAL AROUSAL

Modern media technology and its fast pace combine with the highly-specialized structure of an intensely competitive media industry to craft

8. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 & cmt. (3d ed. 1993).

messages that distort audience understandings. Audiences become polarized, seeking politically-slanted and emotionally intense news coverage over more accurate but dispassionate analysis.

1. The Effect of Modern Media Technology and Its Fast Pace

In everyday life, individuals routinely reach ill-informed opinions about a wide array of matters. Most of us lack the time to gather information independently about political, social, and economic events. Nor do we have the time to investigate the reliability of data provided by others. We get our information on matters of importance, large and small, from the media or the Web.[9] Our lives are busy, rushing to work, school, or both; caring for children; struggling to enliven romantic relationships; desperately seeking time for rest and respite.[10] We function on overload.

Technology and accompanying cultural changes have worsened this state of affairs.[11] In a web-based world, young and old alike increasingly expect to get information in seconds, with the click of a mouse.[12] Overwhelmed by information and choices, we settle for jumping from website to website, rarely taking the time to assimilate information fully or to critique it effectively.[13] This style of searching, repeated day by day, has had demonstrable effects on learning styles and social relationships. High information overload results in decisions based more on emotion, assumption, and stereotype than on reason.[14]

The resulting severe time pressures and frequent interruptions, common in our high-paced, mouse-clicking, multi-tasking world, cause emotional arousal. An aroused brain selects which aspects of the environment to attend to fully based on their emotional intensity.[15] Moreover, we attend more closely to negative than to positive information.[16] The phenomenon of habituation worsens the problem. Like drug addicts, we become accustomed to a certain level of negative, emotionally intense information, leading it to fade into the background. Getting us to focus on an information source thus requires ever more novel, extreme emotional grabs for our attention.[17]

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9. *See* Andrew E. Taslitz, Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly 8–9 (July 23, 2010) (unpublished manuscript) (on file with the Hastings Law Journal).

10. *See id.* at 4–5.

11. *See id.* at 5–6.

12. *See id.* at 4–6.

13. *See id.* at 6–7.

14. *See* JACK FULLER, WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM 60–61, 71 (2010); Gordon H. Bower & Joseph P. Forgas, *Affect, Memory, and Social Cognition, in* COGNITION AND EMOTION 87, 141 (Eric Eich et al. eds., 2000).

15. *See* FULLER, *supra* note 14, at 60–62.

16. *See id.* at 78–79.

17. *See id.* at 71 (summarily defining habituation); MARK JOHNSON, THE MEANING OF THE BODY: AESTHETICS OF HUMAN UNDERSTANDING 34–35 (2007) (defining habituation and its underlying

2. Media Structure and Complicity

The media, traditional and otherwise, know this, preferring to use emotionally charged information and stories to grab our attention.[18] But that only fans the flames of emotion- rather than reason-centered attention.[19] The diverse, highly competitive nature of media coverage also causes specialization by audience. Thus, Fox News appeals to conservatives, MSNBC to liberals, and the Huffington Post to progressives. But this specialization means that viewers in certain groups hear primarily only from those with whom they agree. This contributes to the phenomenon of group polarization: the members of a group becoming increasingly extreme in their views.[20]

3. Resulting Cognitive Distortions

Polarization and the craving for negative emotional intensity also contribute to a variety of cognitive errors. Among these is confirmation bias, leading us to ignore, filter, discount, or distort what little information we receive that contradicts our current views.[21] Another common error is the fundamental attribution error: the tendency to attribute even a small sampling of a person's behavior to that person's fundamental character rather than to his or her situation.[22] This tendency is especially dangerous in criminal cases, because it can lead to quick associations of alleged criminality with evil.[23] The "ultimate [fundamental] attribution error"—the particular tendency to link action with an evil nature based upon the actor's race—amplifies this danger, given racially slanted news coverage and the disproportionate involvement of racial minorities with the criminal justice system.[24] News coverage also favors the emotionally gripping narrative over the dispassionate, abstract argument. Stories grab eyeballs; abstractions shutter eyelids.[25]

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processes in more depth).

18. *See* Taslitz, *supra* note 9, at 10, 16–18.

19. *See id.* at 20–23.

20. *See* FULLER, *supra* note 14, at 69; CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 11–13 (2003).

21. *See* Taslitz, *supra* note 9, at 10–11.

22. *See* FULLER, *supra* note 14, at 76; RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 31 (1980).

23. *See* Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 110–11 (1993).

24. *See* Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 126–27 (2006).

25. *See* FULLER, *supra* note 14, at 120–26 (discussing how the news media, while striking a pose of objectivity, often suggests knowledge of that which it cannot know, such as a suspect's mental state, in the name of telling a good story).

B. Compromised Critical Thinking Skills and Jury Research

The kind of quick, shallow reading encouraged by the Internet compromises audiences' ability to question the accuracy of media information or to deliberate about it effectively. Research on the effect of media coverage of high-profile trials on juries suggests that the adversary system fails fully to correct for these dulled audience critical thinking skills.

1. *The Effect of Net-Reading*

Net readers, who rapidly switch between sources and skim small chunks of information, are less capable of questioning the media's information Blitzkrieg. Explains Jordan Grafman, the head of the National Institute of Neurological Disorders's cognitive neuroscience unit, "The more you multitask, . . . the less deliberative you become; the less you're able to think and reason out a problem."[26] Conformity rises, too, as we "rely on conventional ideas and solutions rather than challenging them with original lines of thought."[27] Simultaneously, there is a growing public distrust of "experts" of any kind, leading viewers to favor Glen Beck over "traditional," expertly trained journalists.[28]

Universities supposedly counter these trends, but that may be wishful thinking, because increasingly affective learning styles and a preference for highly emotional, adversarial styles of argument have been documented among graduate-school-trained academics as well as among the bulk of the populace—which lacks four-year college degrees.[29] Other studies document the widespread inability of college students to conduct thorough research and their reticence to test out the assumptions in the views expressed on their favored websites or by their friends through even quick online investigation.[30] This combination of societal trends breeds viewers who are increasingly drawn to extreme, one-sided, frightening news coverage, particularly of crime (always a juicy subject), with a decreasing ability to analyze the information they receive critically. This is a recipe for bias entering the jury room in high-profile cases.

2. *Impact on the Jury*

The dominant view among jury researchers is indeed that pretrial publicity has negative, anti-defendant effects in high-profile cases.[31]

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26. Don Tapscott, Grown Up Digital: How the Net Generation Is Changing Your World 108–09 (2009) (quoting Jordan Grafman).

27. Nicholas Carr, The Shallows: What the Internet Is Doing to Our Brains 140 (2010).

28. *See* Fuller, *supra* note 14, at 5, 14, 87–88, 96–98.

29. *See, e.g.*, Maggie Jackson, Distracted: The Erosion of Attention and the Coming Dark Age 228 (2008).

30. *See, e.g.*, Larry D. Rosen, Rewired: Understanding the iGeneration and the Way They Learn 155–56 (2010).

31. *See* Joel D. Lieberman et al., *Inadmissible Evidence and Pretrial Publicity: The Effects (and*

There is, however, a dispute about the magnitude of those effects. Pessimists tend to find dramatic effects, while optimists tend to find them minimal.[32] Yet even a minor anti-defendant effect can make the difference in a close case—precisely the kind of case most likely to go to trial. Most other cases are typically resolved by guilty pleas or other less formal means of case resolution.[33] Furthermore, the continuing direction of technology and related social forces discussed above should worsen the ill-effects of media with coming generations.

Lawyers and judges tend to believe that remedial measures, such as careful jury selection procedures, jury instructions, and venue change, can effectively counter media-induced bias.[34] Pessimists read the empirical data otherwise.[35] For example, with voir dire, potential jurors often do not recognize their own unconscious or semi-conscious thoughts and biases, and lawyers and judges have been proven ineffective at discovering such biases, no matter how much they and paid jury consultants are convinced to the contrary.[36] Even a juror who, at the time of voir dire, says that she is ignorant of any press coverage of a particular case may simply not consciously remember what she has earlier seen in the news. If she does indeed lack knowledge of case particulars, she nevertheless may be affected by the overall anti-defendant atmosphere that the media creates.[37]

Optimists embrace the "cumulative remedies hypothesis"—the belief that the combination of "careful voir dire, effective defense counsel, cautionary instructions, jury deliberation, and presentation of trial evidence under real-world conditions should cumulatively minimize or even entirely erase media coverage's negative effects."[38] Yet, the cumulative remedies hypothesis rests on an unrealized premise—namely, that substantial improvements to each of these remedies must be made. Indeed, the improvements may not be adopted either completely or on a piecemeal basis. This reality makes the optimists' hypothesis appear all the more unrealistically sanguine.[39] Moreover, the combination of all these remedies in the real world seems a lot to ask: Guaranteeing

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Ineffectiveness) of Admonitions to Disregard, *in* JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 67, 70 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

32. *See* Andrew E. Taslitz, *The Duke Lacrosse Players and the Media: Why the Fair Trial-Free Press Paradigm Doesn't Cut It Anymore*, *in* RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 175, 182–83 (Michael L. Siegel ed., 2009) [hereinafter RACE TO INJUSTICE].

33. *See id.* at 190.

34. This was certainly the view expressed by some participants in the roundtables that were held in connection with this project at American, Boston College, and Vanderbilt law schools.

35. *See* Taslitz, *supra* note 32, at 187–89.

36. *See* NEIL KRESSEL & DORIT KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING (2004); Lieberman et al., *supra* note 31, at 69, 72.

37. *See* Taslitz, *supra* note 32, at 183–89.

38. *Id.* at 190.

39. *See id.*

effective defense counsel in an underresourced criminal justice system is alone a challenge.[40] In short, the wisdom of the optimists' speculations still awaits further research.[41]

C. Declining Empathy

Additionally, younger generations, who are accustomed to a highly technological style of learning, spend much time texting, perusing social networking sites, playing video games, and surfing the net. Schools discourage close friendships for fear that such closeness in small groups promotes bullying, including cyber-bullying.[42] The reduced amount of face-to-face social contact and the changing nature of the amount that does occur seem to be having ill effects on empathy—one person's ability to stand mentally in another person's shoes.[43]

Repeated exposure to violent video games may also reduce empathy.[44] One study, for example, found the current group of high school graduates to be the least empathetic in many decades.[45] This study was not an isolated one but a meta-analysis of seventy-two different studies of college student empathy.[46] The metastudy found the "biggest drop in empathy after the year 2000," with today's college students being "about 40 percent lower in empathy than their counterparts of 20 or 30 years ago, as measured by standard tests of this personality trait."[47] Numerous other converging sources of empirical evidence support a similar conclusion.[48]

But empathy is essential to judging another person's culpability accurately.[49] Jurors must understand what the defendant thought and felt and why before they can decide whether he acted, for example, in "cold blood" or instead in the "heat of passion."[50] Jurors must be able to make this latter decision relatively dispassionately, but the decision will be

40. *See generally* Nat'l Right to Counsel Comm., Constitution Project, Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel (2009) (providing a comprehensive report on the United States's system of representation for indigent defendants).

41. *See* Taslitz, *supra* note 32, at 190.

42. *See* Hillary Stout, *A Best Friend? You Must Be Kidding*, N.Y. Times, June 17, 2010, at E1.

43. *See* Taslitz, *supra* note 9, at 29–34.

44. *See* Karen E. Dill, How Fantasy Becomes Reality: Seeing Through Media Influence 67–68 (2009).

45. *See* Diane Swanbrow, *Empathy: College Students Don't Have as Much as They Used to*, U. Mich. News Serv. (May 27, 2010), http://www.ns.umich.edu/htdocs/releases/story.php?id=7724.

46. *Id.*

47. *Id.* (quoting Sara Konrath).

48. *See, e.g.*, Taslitz, *supra* note 9, at 29–34.

49. *See* Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 Tex. Tech L. Rev. 419, 431–52 (2009).

50. *See* Ellen S. Podgor et al., Mastering Criminal Law 130–32, 147–49 (2008).

poorly informed if empathy has failed.[51] Emotionally overwrought media coverage can only worsen this state of affairs.

D. SUMMING UP

None of this analysis means, of course, that a defendant in any individual high-profile case cannot get a fair trial. But this analysis *does* likely mean that there is always a substantial risk of this unfairness in these cases. A standard that requires prosecutors to decide which cases raise such a risk, or, in the words of the ABA, raise a "substantial likelihood"[52] of such, and which do not is thus one based on mere fancy. The purported distinction to be made does not exist. The same might be said of the requirement that the risk be "material[]."[53]

Moreover, if the risk did exist, there is no empirical data of which I am aware suggesting that prosecutors could make the case-specific distinction (risk versus no risk) accurately, much less determine in advance of trial whether the risk has truly been controlled and fairness achieved. Of course, lawyers must make common sense best guesses all the time in the absence of empirical data. But the substantial risk test asks lawyers to make a judgment about a possibility that likely does not exist, because there will always be a risk. The test makes lawyer judgments on this matter particularly dangerous, because *any* judgment that a substantial *risk* does not exist will be wrong.

II. PUBLIC CONDEMNATION OF THE ACCUSED

If there is a substantial risk of an unfair trial from emotionally compelling, anti-defendant media coverage, there is surely a substantial pretrial risk of undue injury to the defendant's reputation for similar reasons. Reputational injuries should not be lightly dismissed. They can cost an individual money, jobs, political power, and social contacts.[54] They can induce depression, poor health, divorce, and social exclusion.[55] Even an acquittal at trial does not readily repair these injuries. Reputational harms can linger for years.[56] Audiences wonder, "Was he truly not guilty, or did he just beat the system?" Doubts remain. Even when it is eventually possible to get past those doubts, the emotional

51. *See* Taslitz, *supra* note 49, at 431–52.

52. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2010).

53. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(c) (Proposed Revisions 2010).

54. *See* Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 396, 404–05, 425–26, 438, 448 (2009).

55. *See id.*

56. *See id.* at 424; *infra* text accompanying notes 58–75.

pain and social exclusion suffered will not be quickly forgotten, its wounds not easily healed.[57]

The white Duke lacrosse players stand as a memorable recent example. They were wrongfully accused of gang-raping or serially-raping a black dancer.[58] The Durham, North Carolina prosecutor, Michael Nifong, and the media long portrayed the lacrosse players as racist brutes.[59] Some media reports used animalistic metaphors, describing the players as "moving in a pack."[60] The local Durham newspaper, the *Herald-Sun*, claimed that the players brought frat-boy culture to a "whole new sickening level."[61] Campus protests and candlelight vigils urging the law not to protect the rapists sprouted.[62] A local Raleigh paper, the *News and Observer*, suggested that the players were all loud drunkards.[63] Clergymen condemned the players from the pulpit; several professors in classes in which the players sat denounced them as racist rapists; cable news commentators agreed; and, one professor publicly labeled the players as unclean frequent lawn-urinators, who made a habit of slinging racist slurs.[64] Protestors waved signs demanding that the players confess and be castrated, and the local NAACP and university president joined the condemnation bandwagon.[65] The players were suspended from school, and many either had their education interrupted or were forced to complete their degrees elsewhere.[66] They became social pariahs; in *Newsweek*'s words, they were "[s]trutting lacrosse players[,]" "macho and entitled," no more than "thugs."[67]

The harm was particularly grievous for one player: Reade Seligmann. Before the rape accusations, Seligmann's hometown residents widely gave glowing reports about his character, as did his teachers.[68] He volunteered to help the needy in Appalachia and in poor

57. *See* Taslitz, *supra* note 32, at 178–82.

58. *See* Robert J. Luck & Michael L. Seigel, *The Facts and Only the Facts*, *in* RACE TO INJUSTICE, *supra* note 32, at 3, 3–27 (summarizing case facts).

59. *See* STUART TAYLOR, JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 64–66, 85–88, 103 (2007); DON YAEGER & MIKE PRESSLER, IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED 99–105, 147–56 (2007).

60. TAYLOR & JOHNSON, *supra* note 59, at 64–66, 85–88, 103.

61. *See id.* at 90.

62. *Id.* at 66–67.

63. Jim Nesbitt, *Team Has Swaggered for Years*, NEWS & OBSERVER (Apr. 9, 2006), http://www.newsobserver.com/2006/04/09/46527_team-has-swaggered-for-years.html.

64. *See id.*

65. *See* TAYLOR & JOHNSON, *supra* note 59, at 73, 85–88, 145.

66. *See* authorities cited *infra* note 75.

67. TAYLOR & JOHNSON, *supra* note 59, at 8 (quoting *What Happened at Duke? Sex. Race. A Raucous Party. A Rape Charge. And a Prosecutor Up for Re-Election. Inside the Mystery That Has Roiled a Campus and Riveted the Country*, NEWSWEEK, May 1, 2006, at 40).

68. *Id.* at 12–15.

sections of New York City.[69] His high school gave him the Fighting Spirit Award for the strength of his character, integrity, and drive to excel.[70] The rape charges rapidly reversed his positive public reputation, bringing the new brutish image to a much wider audience.[71] Although eventually, and slowly, the tide started turning in the players' favor, public humiliation still hung over their heads. Seligmann described the impact the experience had on him and his fellow players:

> To see my face on TV, and that, you know, in those little mug shots, and above it saying, you know, "Alleged rapists." You don't know what that does to me and to my family and to the people who care about me.... Your whole life, you try to, you know, stay on the right path, and to do the right things. And someone can come along and take it all away, just by going like that. [He pointed a finger.] Just by pointing their finger. That's all it takes.[72]

The prosecutor was eventually disbarred for his misconduct, and the case transferred to the state's Attorney General's Office, which ultimately dropped the charges based upon unequivocal exculpatory evidence.[73] The lacrosse players began living their lives again—but only after a year of psychic pain, public ostracism, and emptied family coffers: Seligmann's family alone was thoroughly financially drained by the need to pay legal fees and post $400,000 in bond to keep Reade out of jail prior to the expected trial.[74] The lacrosse players also suffered interrupted or redirected educations, truncated sports participation, and diverted career plans that stemmed from grievous wounds to their reputations.[75]

A *conviction*, in the view of many commentators, appropriately should expose a defendant to stigma and ostracism, at least if it is proportionate to her crime and ends when her sentence has been served.[76] One of the functions of criminal law, in this view, is to express society's moral outrage at the violation of its central moral principles, the principles that bind us into a single society.[77] But preconviction, there is a presumption of innocence, a presumption that the Duke lacrosse players' case shows is often well deserved.[78] Moreover, even if convicted at trial,

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69. *Id.* at 14.

70. *Id.*

71. *Id.* at 182.

72. *Id.* (alterations in original) (emphasis omitted) (quoting *60 Minutes: Duke Rape Suspects Speak Out* (CBS television broadcast Oct. 5, 2006)).

73. *See* Luck & Siegel, *supra* note 58, at 25–27.

74. *See* TAYLOR & JOHNSON, *supra* note 59, at 189.

75. *See* Luck & Siegel, *supra* note 58, at 25–27; *see also* TAYLOR & JOHNSON, *supra* note 59, at 145, 182, 189.

76. *See* Taslitz, *supra* note 54, at 406–15.

77. *See* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305, 348–49 (2001).

78. *See* Taslitz, *supra* note 54, at 407–08.

an offender might be convicted only of a lesser offense, meriting lesser condemnation. Undue condemnation thus serves as a collateral or invisible punishment beyond that imposed by the sentencing judge.[79] Furthermore, excessive public condemnation postconviction but pre-sentencing pressures the sentencing judge toward the harsher end of the sentencing scale, a sentence resulting more from public outrage than reasoned analysis.[80]

The drafters may have used their prohibition against prosecutor statements raising a substantial likelihood of "unnecessarily heightening public condemnation of the accused"[81] to express the idea that some level of deserved public condemnation is inherent in a criminal conviction. This language may simply counsel the prosecutor not to make statements that risk heightening condemnation beyond what is deserved. But this is a risky business pretrial, where the "accused" is just that—merely accused and potentially facing acquittal or conviction of a lesser charge than the maximum sought, thereby meriting lesser condemnation or none at all.

Furthermore, though legal theory counsels *no* level of condemnation pretrial because of the presumption of innocence,[82] the drafters may have recognized that some level of condemnation will nevertheless necessarily occur, at least in a high-profile case. But since no level of condemnation is deserved pretrial, it is hard to see in such cases how the prosecutor's increasing the prevailing level of condemnation could ever be "necessary." Similarly, postconviction but pre-sentence, any heightening of public condemnation risks tainting the sentencing process and the accuracy of its results.[83]

Of course, postconviction, a prosecutor might conclude that an offender has not suffered enough public condemnation. But allowing the prosecutor's judgment about the deserved degree of condemnation to justify using the media to heighten it is unwise. First, given the analysis of media markets and the impact of technology in a fast-paced world above, the accuracy of her judgment that public condemnation is too weak is questionable in a high-profile case. It is more likely to be too high. Second, and relatedly, is it really wise to trust even the most well-meaning prosecutor with the discretion and enormous power of deciding whether the level of public condemnation is adequate? How would prosecutors be guided in making such a decision? Why would they be

79. *See id.* at 407–15, 437–39.

80. *See* Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275, 278–83 (2009).

81. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.7(c) (Proposed Revisions 2010).

82. *See* Taslitz, *supra* note 54, at 407–08.

83. *See supra* notes 79 & 82 and accompanying text.

better suited than sentencing judges to make such a determination, and why should a prosecutor's determination be any more accurate than the stigmatization embodied in the formal act of imposing a specific sentence pursuant to legally specified criteria? Ultimately, the distinction between "necessary" and "unnecessary" heightening of public condemnation and the question of whether the risk of its occurring is substantial (if that decision is left to the prosecutor) creates a morass of ambiguity, a risk of abuse, and an invitation for error from which the justice system would find it difficult, and perhaps impossible, to extricate itself. System participants would thus either need to deceive themselves about their participation in these wrongs or ignore the rules entirely.

III. FREEDOM OF SPEECH

Part III now turns to the other side of the balance: the free speech benefits of expression by trial actors, with Part III.A examining free speech values and Part III.B focusing specifically on the role of lawyers, especially that of prosecutors.

A. FREE SPEECH AND THE TRIAL PROCESS

High-profile trials are opportunities for debating basic values, thus making them important public expressive arenas, for at least six reasons: (1) they affect group status; (2) they serve as morality plays; (3) they use juries to bring political values into the courtroom; (4) they aid in governing by crime or counteracting it; (5) they prompt debate in the court of public opinion; and, (6) they promote individual and collective self-rule.

1. Trying Individuals Affects Group Status

A criminal trial is more than a dispute resolution mechanism. Criminal trials necessarily involve political issues.[84] The criminal justice system is designed to brand persons with society's greatest mark of stigma: a criminal conviction.[85] But the fate of the individual is often linked to the fate of socially salient groups.[86]

Racial minorities, for example, make up an enormous percentage of those convicted of crime.[87] That reality links skin color to criminality, a connection amplified by the media: The public face of crime in America is frequently a black face.[88] That outcome is no mere accident, though it

84. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250 (J.P. Mayer & Max Lerner eds., 1966) (1840) ("The jury is . . . above all a political institution . . . .").

85. *See supra* text accompanying notes 54–80.

86. LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 135–44 (1987).

87. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7 (2010).

88. *Id.* at 102–05.

need not turn on any conscious ill will.[89] Studies have repeatedly shown that the more "Afrocentric" one's face, the harsher the sentence; likewise, the blacker the juvenile, the more likely she will receive juvenile facility commitment rather than probation.[90] Other studies suggest that skin color plays a significant role in what triggers police suspicion of criminality in the first place.[91] Moreover, skin color likely plays an important role in convicting the innocent, affecting how aggressively police seek confessions and believe informants, as well as how "suspiciously" police-fearful minorities behave.[92] All this operates at a subconscious and institutional level, no matter how well-meaning the individual actors.[93] This sad state of affairs is also closely correlated with class: when combined with race, poverty is an excellent predictor of the likelihood of a criminal conviction.[94]

Yet if the processes occur unconsciously, the results are obvious for all who care to see. Law professor Michelle Alexander has thus declared our current incarceration policies the "New Jim Crow."[95] Former prosecutor Paul Butler has called for massive acts of resistance by black jurors, urging them never to vote to convict nonviolent black offenders.[96] That many, or even most, of those arrested may be guilty does not resolve the problem. Many commentators believe that societal factors, such as poverty, residential and educational segregation, and weakened job markets—all due to subconscious and institutional racism—themselves contribute to criminal behavior.[97] When such behavior occurs, much of it is nonviolent and results in penalties thoroughly out of proportion to any sound deterrent or retributive philosophy.[98]

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89. *See id.*

90. *See* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 140–47 (2003) (summarizing studies showing that African-American children adjudicated delinquent are far more likely than are similarly situated white children to face commitment to a juvenile facility); *see also* William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2005) (concluding that sentencing harshness is linked to the extent of the defendant's "Afrocentric features" as distinct from skin color).

91. *See* Taslitz, *supra* note 24, at 127–30.

92. *See id.* at 130–33; Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1091–99 (2009).

93. *See* Taslitz, *supra* note 92, at 1091–122.

94. *See* J. McGregor Smyth, Jr., *From Arrest to Reintegration*, 24 CRIM. JUST. 42, 42–43 (2009).

95. *See* ALEXANDER, *supra* note 87, at 2–3.

96. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715–18 (1995).

97. *See, e.g.*, Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 428–31 (2009).

98. *See* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 17–26, 29, 34 (1995) (noting that most of the incarcerated have committed nonviolent crimes and suffer penalties grossly disproportionate to any likely deterrent value while disparately impacting racial minorities); *see also generally* DOUGLAS HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (Colin Mcginn ed., 2002) (articulating a book-length defense of this point for drug crimes).

Race and class discrimination and the corresponding politicization of criminal punishment are thus a way for politicians to show support for "good, hardworking Americans" and to build solidarity among a frightened and fractured majority white population, resulting in punishments that are not only excessive but also enduring.[99] "Invisible punishments" persist long after sentences end, including bans on ex-felons obtaining public housing, educational loans, and a host of other benefits essential to real rehabilitation.[100] These continuing punishments themselves take on a racial tinge.[101]

Many high-profile criminal trials in America can thus be seen as skirmishes in a broader social war involving class and race. Even when a criminal defendant is wealthy, the terms of race and class warfare can dominate public understandings. That domination is particularly evident in high-profile cases, such as the O.J. Simpson murder trial[102] or the Kobe Bryant sexual assault charges.[103]

If that war seems aimed at criminal *suspects*, criminal victims can become ensnared in analogous warfare, namely, over gender roles. Perhaps the best example is the rape trial. Rape trials involving a consent defense turn in particular on public conceptions of proper gender behavior.[104] "Consent," whose absence is a prerequisite to a rape conviction, is rarely defined for jurors in any useful way.[105] Jurors thus turn to their own ideas about how men and women should relate to one another, the nature of human sexuality, and the meaning of coercion in a sexual situation to determine whether consent was present.[106] These ideas themselves stem from dominant cultural narratives about gendered behavior.[107] Dominant narratives usually work against women who have violated cultural dating taboos, perhaps by wearing "sexy" clothing, too readily agreeing to be alone with an unfamiliar man, or engaging in "flirtatious" behavior.[108] None of these taboo violations means, however, that a woman has consented to intercourse. Yet many studies suggest

99. *See* MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2011) (outlining an extended explanation of this reality); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 829–33 (2000).

100. *See* Smyth, *supra* note 94, at 42–55.

101. *See id.* at 43.

102. *See generally* Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219 (1998) (discussing the O.J. Simpson trial and racial bias in criminal cases).

103. *See* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 381–84 (2005).

104. *See* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 416–19 (1996).

105. *Id.* at 421.

106. *Id.* at 422–24.

107. *See id.* at 429–31.

108. *See id.* at 440–48.

that even self-identified "feminist" jurors are unlikely to be persuaded that consent was absent when one of these situations rears its head.[109]

The socially nonconforming rape victim is thus in a real sense a dissenter, asking jurors to accept alternative narratives about values and what her behavior means.[110] Jurors deliberate, therefore, not only about the raw facts—what happened—but about those events' meaning, in turn deliberating about fundamental social mores, norms, and values.[111] A not-guilty verdict under such circumstances stigmatizes the victim and reinforces what many might describe as oppressive, gendered social norms, thus indirectly affecting all women.[112] Moreover, jurors' underlying values affect whom the jurors believe and thus affect what they conclude the raw facts are in the first place.[113] The distinction between facts and values at a criminal trial is therefore never a sharp one.

2. *Trials Are Morality Plays*

Even apart from links among victims, those accused, and their salient social groups, every trial of an individual serves as a kind of morality play.[114] Defendants struggle to craft one narrative, prosecutors another.[115] Those narratives involve fundamental moral issues: the alleged deception of the securities defrauder, the infidelity of the murdered spouse, the macho posturing of the frightened gang member. Each side may view events very differently.[116] Was a defendant's killing done in his genuine fear of facing imminent serious bodily injury at the victim's hands, thus requiring his acquittal for acting in self-defense?[117] Was the killing instead motivated by the defendant's sudden anger at the victim, a heat-of-passion killing meriting a lighter penalty?[118] Or was the defendant's act one done in cold blood, for profit or vengeance?[119] In the real world, motives can also be hard to tease out. A defendant might be angered at her victim precisely *because* she fears the victim, as an abused spouse might be when she shoots her husband.[120] Yet the law requires

109. *See, e.g.*, ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 7 (1999); Taslitz, *supra* note 104, at 468–71.

110. *See* Taslitz, *supra* note 104, at 435–39.

111. *See id.* at 419–24.

112. *See id.* at 493–94.

113. *See id.* at 419–22.

114. *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 33–34 (2009) ("Placing the [trial] facts in a narrative form 'is a demand . . . for moral meaning, a demand that sequences of events be assessed as to their significance as elements of a moral drama.'" (alteration in original) (quoting Hayden White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE (W.J.T. Mitchell ed. 1981))).

115. *See, e.g.*, Taslitz, *supra* note 54 (discussing the proper role of prosecutors).

116. *See* Taslitz, *supra* note 104, at 410–13 (discussing the Rashomon-like nature of trial facts).

117. *See* PODGOR, *supra* note 50, at 315–22.

118. *See id.* at 147–49.

119. *See id.* at 130–35.

120. *See id.* at 331–32.

jurors to place those motives into one category (fear) or another (anger) rather than accepting life's messy ambiguity. Even in the abused spouse case, therefore, values necessarily play a role.

But a criminal conviction seeks to condemn not merely a morally wrong action but an action that has in some sense injured the public rather than solely the individual.[121] It is tort law that vindicates individual harms, while criminal law vindicates collective ones, or harms to "the People."[122] In this sense too, therefore, every criminal verdict is political, because it is a declaration via a governmental body representing the will of the People—the jury—that the People have been wronged.

3. Juries Bring Political Values into the Courtroom

Indeed, the jury is itself a highly political body.[123] Its political nature is among its strongest justifications. It allows ordinary people to play a role both in law creation—for example, defining "consent" in a rape case, as discussed above—and law application.[124] In two co-commentators' views, the jury plays a role in the judicial branch similar to the two houses of Congress.[125] In the latter case, the House and the Senate check one another, each preventing abuses by the other. In the former case, the judge and the jury check one another, the jury being the more populist branch.[126]

But the jury, while in some sense a "representative" body, is primarily a deliberative one.[127] It is designed to engage in an exchange of views that determine an individual's fate.[128] It does so pursuant to an adversarial process intended to keep it advised of all relevant information and arguments on both sides of each issue.[129] Its verdict justifies the State's exercise of its authority to make legitimate use of physical force, which will forever change the lives of the accused, of her family and friends, and sometimes of the victim. The jury is thus both the voice of the People and of a governmental institution to which parties turn for fairness and judgment. Moreover, its judgment has not only physical consequences, such as potential imprisonment, but also symbolic ones, the stigma and isolation of being labeled a "felon."[130]

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121. *See* Taslitz, *supra* note 77, at 348–49.

122. *See id.* at 346–47.

123. TOCQUEVILLE, *supra* note 84, at 250.

124. *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1199–201 (1998).

125. *See* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 52–53 (1998).

126. *Id.*

127. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 8 (1994).

128. *Id.*

129. *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 59, 100, 120, 169, 179 (1999).

130. *See* Taslitz, *supra* note 92, at 1102–08.

4. Trials Aid in Governing Through Crime or Resisting It

The political nature of the criminal trial is further illustrated by the phenomenon of "governing through crime."[131] This sort of governance uses "crime-fear" as a way to justify oppressive state policies and then uses those policies as a model for governing other social institutions.[132] Schools become ruled by "zero tolerance policies" and workplaces by excessively invasive drug-testing policies.[133] The public's fear of crime gives rise to the policy of ex-felon disenfranchisement; in turn, lifelong loss of voting rights for ex-felons, who have long ago proven that they are no longer a danger to society, disenfranchises precisely the minority communities most hurt by crime, and by mass incarceration and its concomitant racially discriminatory policies.[134] Privacy and free speech rights face erosion in the need to favor order, conformity, and social cohesion as ways to calm fears of disorder, terrorism, and ordinary crime.[135] Because of its connection to these greater issues of governance, the operation of the criminal jury necessarily affects how American democracy more broadly operates and how it is understood by its participants.

The media, of course, play a major role in all these processes. As Part I of this Article explained, the media are drawn to stories that amplify fears of crime, even at a time when crime rates are declining. The media are especially drawn to novel or extreme cases, not the common ones.[136] Hence, the unrepresentative case becomes the high-profile one. Yet it is this type of case in which the broader social issues symbolized by criminal law and the criminal trial itself will be contested. The morality play occurs not only in the courtroom, but also in the press room and on the television and computer screens of the nation.[137] Investigative reporters make careers writing books, then screenplays, about high-profile crimes.[138] These cases even prod political action, leading to the

131. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007).

132. *See id.* at 4–10.

133. *See id.* at 219, 222, 241.

134. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 69–84, 168–70 (2006).

135. *See* Nasser Hussain & Austin Sarat, *Introduction: Responding to Government Lawlessness: What Does the Rule of Law Require?*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 1, 1–9 (Austin Sarat & Nasser Hussain eds., 2010) (discussing the terrorism context).

136. *See* FULLER, *supra* note 14, at 76.

137. *See* LYNN S. CHANCER, HIGH-PROFILE CRIMES: WHEN LEGAL CASES BECOME SOCIAL CAUSES (2005) (detailing this idea by examining selected high-profile crimes in depth).

138. *See id.* at 61 (discussing reporter self-interest); MARK FUHRMAN, THE MURDER BUSINESS: HOW THE MEDIA TURNS CRIME INTO ENTERTAINMENT, at xiii–xiv (2009) (discussing books he has written about his cases, as an investigative reporter, while criticizing other reporters for skewing stories based on their self-interest).

passage of "Meghan's Law" to protect children,[139] higher insanity-defense burdens after President Reagan's shooting,[140] and enhanced support for ending parole after the "Willie Horton" advertisements helped to bring down the Michael Dukakis presidential campaign.[141]

5. Trials Occur in the Court of Public Opinion, Too

The high-profile case thus requires arguments to two courts: that of public opinion and that of the physical courtroom.[142] Public opinion is, of course, reflected in and molded by the media.[143] Because issues of criminality are so closely linked to political and moral concerns in America, those concerns necessarily are reflected in media portrayals about particular cases. Broader political and public values and processes thus necessarily affect how potential jurors will view a specific case, making the media coverage of such a case of obvious interest to the parties and their lawyers.[144] Simultaneously, in a high-profile case, the defendant, witnesses, and the State become seen as representatives of particular moral and political perspectives, whether or not these persons so see themselves.[145] Media access denied or restricted to any of these persons thus may become seen by some members of the public as silencing their voices. For these reasons too, party access to the press becomes critical.

The general tenor of modern American law on free speech favors a philosophy opposed to prior restraints, protective of offensive and even linguistically brutal forms of combat, and generous to an exceptional degree in limiting state restrictions on the varied forms of public debate.[146] Granted, that law also makes exceptions to this general attitude and seems insensitive to the ways that an unregulated market in ideas can often lead large and powerful speakers to silence smaller and weaker ones. Nevertheless, the law's general tenor contributes to a reluctance to silence media coverage of crime, including especially high-profile cases.[147]

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139. Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 10, 12 (2010) (describing Meghan's Law).

140. Edward J. Imwinkelried, *Forensic Science: Scientific Evidence—and Statutes*, 43 CRIM. L. BULL. 739, 745 (2007) (describing the effect of Hinckley's acquittal, on the basis of his insanity defense, for shooting President Reagan.).

141. Milton Heumann et al., *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41 CRIM. L. BULL. 24, 25, 36–37 (2005).

142. *See* JAMES F. HAGGERTY, IN THE COURT OF PUBLIC OPINION: WINNING STRATEGIES FOR LITIGATION COMMUNICATIONS, at xix–xxiii (2d ed. 2009).

143. *See generally* RAY SURRETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES (3d ed. 2006).

144. *See* Taslitz, *supra* note 104, at 417, 428–29.

145. *See* CHANCER, *supra* note 137, at 6.

146. *See generally* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT (3d ed. 2009); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305–10 (2001) (comparing the general application of these doctrines to application to lawyers).

147. Denise M. Chanez, Note, Twohig v. Blackmer*: New Mexico's Broad Protection for Trial*

Indeed, this coverage has become such an entrenched part of American culture that it is a major form of public entertainment.[148] The press and perhaps the People themselves would likely howl with anger were important information sources (the lawyers) blocked by the hand of the State. While many other western countries are more deeply concerned than we are about fair trials, the distinctively American conception of free speech seems to valorize coverage of the high-profile case.[149]

For all these reasons, there is a strong conceptual argument to be made in favor of preserving the use of lawyers as sources for crime coverage by the media. Failing to preserve lawyer-sources would be viewed by many as silencing the voice of individuals, collectivities, and the People. Yet the need for a meaningful voice is central to the American concept of self-governance, to which we next turn.[150]

6. Trials Promote Self-Rule

A meaningful hearing—one offering a real prospect of one's views being heard, carefully considered, and bearing on the outcome—can promote a sense of catharsis and empowerment, even on the part of losers and dissenters.[151] The catharsis of being heard makes hierarchy less oppressive, as does the sense that the oppressor's worst abuses will be exposed and therefore chilled.[152] Research in procedural justice about the trial and other dispute resolution mechanisms indeed supports this conclusion. Defendants having a fair opportunity to make their case, for example, that their confession was coerced by the police or their prosecution racially motivated, are more likely to accept a guilty verdict and less likely, all else being equal, to offend again.[153]

These examples are particularly apt, because they also demonstrate how a truly *public* trial can expose, and therefore help to discourage, abuses by the State. Respected commentators have argued that the Confrontation Clause's protection of meaningful cross-examination—indeed, all the criminal procedure-related protections of the Bill of Rights—aim partly at this checking-by-transparency function.[154] The press

Participant Speech and the Hurdles to Cross Before Imposing Gag Orders, 35 N.M. L. REV. 587, 587–88 (2005).

148. *See id.* (mentioning Michael Jackson, Kobe Bryant, and Scott Petersen).

149. IAN CRAM, A VIRTUE LESS CLOISTERED: COURTS, SPEECH AND CONSTITUTIONS 93–98 (2002).

150. *See* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 5–6 (1998).

151. *See* STEPHEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 96 (1990).

152. *See id.*

153. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 63 (2006).

154. *See* AMAR & HIRSCH, *supra* note 125, at 52–53, 57; Andrew Taslitz, *Catharsis, the Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103, 103, 122–23 (1993).

is an important part of creating the exposure necessary to that function's being served well.[155]

A meaningful hearing also promotes collective self-rule. Self-rule happens when the laws are made by the people to whom they apply.[156] In practice, this means that self-rule requires participation by all citizens, minority and majority, male and female, in making the laws.[157] As noted earlier, trials involve law creation as much as law application.[158] Meaningful, open participation by interested parties in this process of law-creation by the jury is thus an act of self-rule. In the words of the U.S. Supreme Court, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[159]

Self-rule is often misconceived as an individualistic project: If all citizens can express their views in a free marketplace of ideas, we have self-rule.[160] But mere individual expression to those who will not listen is not a "discussion . . . responsive to the will of the people . . . ."[161] Self-rule is, at heart, an effort to reconcile individual wills with a general will. But a "general will" requires deliberation about our identity *as a people*, "who we shall be, for what shall we stand."[162] Our sense of being a people or a "public" in a culturally diverse society requires confronting divergent attitudes. Only when we learn to speak across our differences in search of a common ground can our decisions be said to reflect a "general will."

This last point reveals the double-edged sword that is media coverage of the high-profile trial. On the one hand, apart from the jury's verdict, broader involvement by more of the public in the debate potentially advances the clashing of views and discussion necessary to craft a general will on criminal justice policy and application. On the other hand, to the extent that the social forces described in Part I of this Article dominate, this debate may be one that excludes or muffles or distorts too many voices, making the resulting "will" not general or deliberative, but partial and ill-informed.

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155. *See* Taslitz, *supra* note 154, at 124.

156. My analysis of self-rule here fuses ideas developed in other sources. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119–96 (1995); Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 343, 346 (1981); John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 49–74 (1997).

157. *See* JAMES S. FISHKIN, WHEN PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION (2009).

158. *See supra* text accompanying notes 123–25.

159. Stromberg v. California, 283 U.S. 359, 369 (1931).

160. *See* Pitkin, *supra* note 156, at 327, 343, 346.

161. *Stromberg*, 283 U.S. at 369.

162. Pitkin, *supra* note 156, at 346.

Likewise, to the extent that press coverage and the general anti-defendant atmosphere lead jurors to silence or not even to consider dissenting views, to react instinctively more than deliberatively, and to favor catharsis over accuracy, defendants and their sympathizers feel denied a fair voice in the individual case outcome and in the broader debate over public policy issues. Under these circumstances, media coverage may undermine rather than enhance important political functions of free press coverage of trials.

Such an undermining is no small matter. The Declaration of Independence's bold declaration of the right to pursue happiness is at the center of what defines us as Americans.[163] Yet the original conception of that pursuit and modern social science both make clear that the quality of government and political and social equality of certain kinds are all essential ingredients to making the pursuit of happiness real.[164] The quality of government includes concerns about voice and accountability and about the rule of law.[165] Voice and accountability refers to the "degree to which citizens participate in choosing their government and the degree of freedom accorded to speech, association, and media expression."[166] The rule of law combines concerns about the "likelihood of crime and violence, the effectiveness of the police and courts, and the extent to which officials abide by the rules of society."[167] In wealthier western countries, such as the United States, the "rules of society" especially include muscular guarantees of personal freedom.[168] Trust in public officials, particularly the police, is a critical contributor to happiness.[169]

A trial giving parties *effective voice*—voice with a real chance of affecting outcomes[170]—rather than a merely simulated one may thus seem to require free access to the press, including, in particular, the ability to reveal alleged abuses by police or other state authorities. But if social biases, media and market pressures, and inadequate trial procedures make media coverage a means of silencing some while giving voice to others, this undermines the important role of *political equality*, a

163. *See* CARTER, *supra* note 150, at 5–6.

164. *See generally* Andrew E. Taslitz, *The Happy Fourth Amendment: History and the People's Quest for Constitutional Meaning*, 43 TEX. TECH L. REV. 1, 32–52 (2010) (tracing the history and social science).

165. *See* DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING 23, 181 (2010).

166. *Id.* at 181.

167. *Id.*

168. *See id.* at 22–23.

169. *See id.* at 23, 181–82, 201–02.

170. *See* Victoria Smith Holden, *Effective Voice Rights in the Workplace*, *in* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 114–24 (David S. Allen & Robert Jensen eds., 1995).

status reflective of all the People.[171] Moreover, if media coverage is partial and misleading, and if it is not readily capable of being subjected to critical scrutiny by the citizenry, as Part I explains, the weight of many of the free speech benefits of high-profile trials—which turn on accurate, open, diverse, inclusive, and complete public discussion—decline considerably. Yet as the relative worth of these free speech values declines, the relative harm to reputations pretrial rises as a countervailing consideration, as Part II explained.

The balance between free speech interests and fair trial ones is thus partly a normative question and partly an empirical one. The issue is normative because of the various principles of political morality involved in the balance. The empirical issue has not yet been answered adequately and, given the current state of social science, is based upon our best guesses. Such best guesses require further examination of the dangers to a fair trial and the role of lawyers.

B. LAWYERS AND THE DANGERS FREE SPEECH POSES TO A FAIR TRIAL

The standard objections to lawyers engaging in pretrial publicity are simply stated: first, that otherwise inadmissible evidence will reach potential jurors, including evidence available only to the lawyers, not to the press; second, that shy witnesses will be discouraged from coming forward and that publicity-hungry witnesses will slant their stories to gain fame; third, that witnesses will confuse their independent memories with the media's version of the facts; fourth, that the privacy of witnesses (such as a complainant in a rape case) will be violated; fifth, that fear of public pressure from publicity will cow jurors and judges into decisions they otherwise would not make; and sixth, that lawyers will give in to a conflict of interest between the needs of their clients and the lawyers' financial interest in attaining fame.[172] Other major concerns are that the innocent will be convicted by an angry mob rather than by a dispassionate jury, and that witnesses and defendants will suffer insult and stigma.[173] These concerns are amplified in the case of prosecutors, whose veneer of impartiality as a voice of the People may mean that the public gives their words special deference.[174]

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171. *See* Taslitz, *supra* note 164, at 37–39 (analyzing the importance of political equality to individual, communal, and national happiness).

172. *See* PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 45–48, 66 (2009).

173. *See* Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1038–52 (2010); *supra* text accompanying notes 54–83.

174. *See* KENDALL COFFEY, SPINNING THE LAW: TRYING CASES IN THE COURT OF PUBLIC OPINION 242–43 (2010) (explaining that "prosecutors command so much personal and institutional respect" that standards governing their use of pretrial publicity are especially important (quoting a telephone interview with former prosecutor Laurie L. Levenson)).

Media coverage can also wrongly entrench party positions. A lawyer who publicly commits to one theory—for example, that her client did not do the act but was trapped by a deeply mistaken eyewitness—may be hamstrung if later investigation suggests that a better approach is to admit to the criminal acts but raise self-defense, insanity, or entrapment defenses.[175]

Alternatively, an elected prosecutor running on a platform of vigorously prosecuting a particular case may feel bound to do so even if later evidence suggests that the opposite course of action is wise.[176] The prosecutor may lack a clear-headed ability to evaluate a case rationally because of the phenomenon of "nonrational escalation of commitment."[177] Once people commit to a course of action, most are reluctant to change their minds. But that reluctance is dramatically magnified when they have made their commitments public.[178] Two well-known ethics commentators consider this phenomenon

> of particular concern in regard to prosecutors. Recent studies reveal early police and prosecutor commitments to prosecuting particular individuals based on incomplete information and reinforced by nonrational escalation to those commitments as factors in wrongful convictions. A campaign pledge to prosecute an individual is a classic example of an early and public commitment based on incomplete information. It creates a psychological barrier to the prosecutor acting in a way that later information may show to be both wise and fair.[179]

Lawyers are aware of the tactical, strategic, and ethical risks of press coverage. Many lawyers, defense and prosecution alike, thus fear communication with the press.[180] Yet in high-profile cases, such communication may be unavoidable. The press will demand it. Defense counsel's refusal to respond to perhaps flawed or overwrought prosecutor statements, or to similarly exaggerated or overly dramatic media reports will be perceived as concessions to their accuracy.[181] The prosecution faces similar risks by its silence.[182]

Avoiding the press is thus often not a practical *strategic* option. Moreover, if, as argued above, there are political justifications for permitting party speech in high-profile cases, and if lawyers, because of

175. *See* JOY & MCMUNIGAL, *supra* note 172, at 99.

176. *See id.* at 99–101.

177. *Id.* at 99.

178. *See id.*

179. *Id.*

180. This observation was also made by several of the lawyers participating in the roundtables on the proposed revisions to the ABA Standards that I attended in the fall of 2010 at Boston College, American University, and Vanderbilt law schools.

181. COFFEY, *supra* note 174, at 170 (though counseling frequent silence, recognizing that it is, among defense lawyers, an "undervalued position"); JOY & MCMUNIGAL, *supra* note 172, at 64.

182. *But cf.* COFFEY, *supra* note 174, at 242–43 (noting that, though prosecutors once were, and some still are, reluctant to talk to the press, others assume that they must do so).

their special training, are among those best qualified to help the client speak effectively, then there may be sound political reasons to let lawyers reach the press.

At the same time, however, the analyses in earlier sections of this Article demonstrate that the risks to a fair trial and to the reputation of the accused are always substantial in high-profile cases; the justifications for restraining lawyers' pretrial contact with the media are thus undervalued. The focus of this piece is on the prosecutor's obligation, but that must be understood in terms of defense counsel's actions and free speech rights as well. What are those rights?

1. Defense Counsel

The seminal case addressing lawyers' free speech rights in representing clients is *Gentile v. State Bar*, which specifically involved *pretrial* publicity.[183] There, Dominic Gentile, a lawyer representing a defendant charged with stealing police-confiscated drugs, held a press conference at which he impugned the prosecutor's motives and alleged that the police themselves committed the theft.[184]

Gentile was charged with ethical violations rooted in a Nevada rule adopting the ban on statements creating a "substantial likelihood of materially prejudicing" a criminal proceeding,[185] which is now the core provision of the proposed Standard that is the subject of this Article. The Court approved of the substantial likelihood test but struck down the version of the Nevada rule before it as unduly vague.[186]

While there were numerous opinions in *Gentile*, its significance lies in five members of the Court agreeing that the State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press.[187] Moreover, these five members did so because they concluded that lawyers are different, serving a special role.[188] Thus, Chief Justice Rehnquist, in an opinion for the Court, stressed "that lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be."[189] Indeed, he concluded, "Even in an area far from the courtroom and the pendency of a case," lawyers are not protected to the same extent as individuals in other professions.[190] A lawyer is "an officer of the court, and, like the court itself, an instrument . . . of justice."[191] Thus, the speech of "lawyers . . . in pending cases may be regulated under a less demanding standard than that

183. 501 U.S. 1030, 1033, 1039 (1991) (plurality opinion).
184. *Id.* at 1033, 1045.
185. *Id.* at 1033.
186. *Id.* at 1033–34.
187. *Id.* at 1071.
188. *Id.*
189. *Id.*
190. *Id.* at 1073.
191. *Id.* at 1074 (quoting Cohen v. Hurley, 366 U.S. 117, 126 (1961)).

established for regulation of the press . . . ."[192] Justice O'Connor reaffirmed these principles in her concurrence.[193]

In response, the ABA adopted a press statements rule that used the substantial likelihood test and, unlike the proposed Standard, also contained more specific guidance for lawyers based upon the subject matter content of their statements to the press.[194] The resulting rule, Model Rule of Professional Conduct 3.6, lists seven categories of statements that an attorney may generally make to the press in a criminal case.[195] Comment 5 to this Rule also creates six categories of statements that are "more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to . . . a criminal matter, or any other proceeding that could result in incarceration."[196]

Yet the Rules leave open wide areas for debate.[197] Perhaps more importantly, as one well-known ethics commentator argues, *Gentile*'s validity is increasingly in doubt.[198] *Gentile* did not adopt a strict scrutiny test but something more like a reasonableness balancing test for examining limitations on lawyer pretrial media statements.[199] But, as discussed below, the Court may be moving toward a strict scrutiny test,[200] and only a few of the Justices writing in *Gentile* remain on the Court.[201] Furthermore, comment 5 prohibits largely only the "poison pills" posing the greatest risk to a fair trial.[202] That leaves ample room for pills causing mere indigestion. Moreover, *Gentile* at most authorized after-the-fact ethics actions, not prior restraints on lawyer speech.[203] Gag orders on parties are strongly disfavored; there is good reason to believe they should, if to a lesser extent, be disfavored for lawyers too, despite *Gentile*'s "officer of the court" references.[204]

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192. *Id.*

193. *Id.* at 1081–82 (O'Connor, J., concurring). But on this point Justices Marshall, Blackmun, Stevens, and Kennedy disagreed. *See id.* at 1034–37 (Kennedy, J., dissenting) (noting that the speech at issue was critical of the government and thus lay "at the very center of the First Amendment").

194. *See* Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497, 519–24 (2007).

195. MODEL RULES OF PROF'L CONDUCT R. 3.6 (1993).

196. *Id.* R. 3.6 cmt. 5.

197. *See* R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67, 80–86 (2008).

198. *See id.* at 76–77.

199. *See id.* at 76–78.

200. *See infra* text accompanying notes 211–37.

201. *See* Cassidy, *supra* note 197, at 76.

202. *See* COFFEY, *supra* note 174, at 146–48 (discussing "poison pills").

203. *See* Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L. REV. 311, 315 (1997).

204. *See id.*

As anyone who has a television can attest, clients in high-profile cases often wage media campaigns.[205] Sometimes they are purportedly done by the client, not the lawyer, though it is hard to see how the line between the two can be effectively maintained.[206] Indeed, says well-known criminal defense attorney Roy Black, "[T]oday's lawyer has an obligation to deal effectively with the media—it's a part of the job to take a proactive stance with reporters."[207] Whether Black reads the ethical rules correctly or not, many defense lawyers behave in exactly that fashion.[208] But this raises the need for prosecutors to respond should defense statements be inaccurate, likely to endanger the State's case, or to ensure that its witnesses are being treated fairly. That is no idle concern, some particularly inflammatory defense media campaigns being well documented.[209] The current Model Rules of Professional Conduct permit responsive commentary, and my only point here is that some such provision is wise.[210]

2. Prosecutors

In the view of leading ethics commentator and former prosecutor Michael Cassidy, media coverage of political candidates' positions is essential to informed public choices in an election, and there is no reason to treat prosecutors differently from other elected officials.[211] In support of his position, Cassidy relies on *Republican Party of Minnesota v. White*,[212] which, he maintains, supersedes "officer of the court" language like that in *Gentile*.[213]

White held unconstitutional, under the First Amendment, Minnesota's state constitutional prohibition against candidates for judicial office, including sitting judges, announcing their views on disputed legal or political issues—Minnesota's so-called "announce clause."[214] In a pre-*White* precedent, the Minnesota Supreme Court had limited the apparently broad meaning of the announce clause, declaring it to reach only disputed issues likely to come before the candidate were he to be elected a judge.[215] Comments on past judicial decisions were,

205. *See generally* COFFEY, *supra* note 174 (summarizing numerous such campaigns, both by defense and prosecutors).

206. *See* JOY & MCMUNIGAL, *supra* note 172, at 63–69 (arguing that the law is unclear but that lawyers probably face trouble if they counsel clients to say what the lawyers cannot, and noting that lawyers may be ethically obligated to counsel clients on whether to conduct a media campaign).

207. COFFEY, *supra* note 174, at 164 (quoting Roy Black).

208. *See generally* COFFEY, *supra* note 174 (recounting examples)

209. *See* Kathleen Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 942–59 (2003) (analyzing one recent example).

210. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983).

211. *See* Cassidy, *supra* note 197, at 71.

212. 536 U.S. 765 (2002).

213. Cassidy, *supra* note 197, at 77.

214. *White*, 536 U.S. at 788.

215. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).

therefore, permissible, although a candidate's public insistence on ignoring the stare decisis effect of such decisions was banned.[216]

Gregory Wersal, a candidate for a judgeship, along with other plaintiffs, filed suit in federal district court seeking a declaration of the announce clause's unconstitutionality as violative of free speech under the First Amendment.[217] Upon the filing of cross-motions for summary judgment, the district court held against the plaintiffs, concluding that the announce clause was indeed constitutional.[218] The U.S. Supreme Court reversed.[219]

The Court concluded that the announce clause permitted content discrimination against speech at the core of First Amendment protections, and therefore subjected it to strict scrutiny.[220] The Court found that the clause, even as narrowly interpreted by Minnesota's Supreme Court, was not narrowly tailored to serve the allegedly compelling state interests of preserving the actual and apparent impartiality of the state judiciary.[221]

There were, said the Court, three possible meanings of "impartiality" in this context. First, impartiality might mean a lack of preconception in favor of a particular view of the law.[222] But such a goal, insisted the Court, is "neither possible nor desirable"—impossible psychologically and undesirable because it would reflect a "complete *tabula rasa*," which is hardly the sort of learned mind sought in a judicial candidate.[223] To pretend otherwise—to lie—for the sake of creating a false appearance of this sort of impartiality cannot constitute a compelling interest.[224]

A second meaning of impartiality might be "open-mindedness," a willingness to remain open to persuasion, at least in a pending case, even on legal questions for which the judge holds a preconceived position.[225] The Court concluded, however, that the State had not met its burden under the strict scrutiny test of establishing that campaign statements of positions are uniquely destructive of open-mindedness.[226] The Court noted that a candidate's promises to take a particular action were banned by separate state laws, but that such promises were not before it, and in any event, it simply was not persuaded that nonpromissory statements of

216. *White*, 536 U.S. at 772.
217. *Id.* at 768–70.
218. *Id.* at 770.
219. *Id.* at 788.
220. *Id.*
221. *Id.*
222. *Id.* at 766.
223. *Id.* at 778.
224. *Id.* at 776–78.
225. *Id.* at 778.
226. *Id.* at 766.

legal and policy positions would in effect operate psychologically as promises committing the former candidate to action once sitting on the judge's bench.[227]

The third sense of impartiality examined by the Court was bias for or against a particular party to the proceeding, the correct position being that the judge who hears a case should "apply the law to [one party] in the same way he applies it to any other party."[228] On this point too, however, the Court declared that "the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense."[229] The clause only restricted speech concerning certain issues, not comments about particular parties. The Court conceded that a party taking a position in a particular case opposite that of an expressed judicial view on an issue is likely to lose.[230] But the Court nevertheless maintained that any loss would not be because of bias or favoritism toward the party but rather because of the judge's even-handed application of the law as he or she understands it.[231]

The Court rejected any rigid distinction between judicial and legislative elections in a country like ours, where courts can "make" common law, set aside laws enacted by the legislature, and alter the shape of state constitutions.[232] Accordingly, any abridgement of the right to speak in the electioneering context turns First Amendment jurisprudence upside down, for "'[d]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,'" and it is "simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign."[233]

Despite *White*'s apparent issues-versus-particular-case discussion, lower courts have not recognized that distinction to be central to *White*'s point.[234] Indeed, several lower courts have struck down application of prohibitions similar to the *White* announce clause, but as applied to judicial commentary *on matters pending or likely to come before the court.*[235] These courts have reasoned that recusals of such judges to protect trial fairness may sometimes be necessary, but silencing judicial speech altogether is not.[236] The bottom line is that even sitting judges'

227. *See id.* at 778–80.

228. *Id.* at 775–76.

229. *See id.* at 776.

230. *Id.*

231. *Id.* at 776–77.

232. *Id.* at 783–84.

233. *Id.* at 781–82 (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989); Brown v. Hartlage, 456 U.S. 45, 60 (1982)) (internal quotation marks omitted).

234. *See* Cassidy, *supra* note 197, at 78–79 (summarizing cases).

235. *See id.*

236. *See id.*

speech on pending matters is political speech, entitled to the highest level of protection.[237]

Professor Cassidy argues that elected prosecutors' speech is indistinguishable in any relevant way from judicial speech.[238] Like judges in lower court cases, prosecutors are always running for office. If their speech ends up endangering the right to a fair trial in a particular case, less restrictive procedural remedies, like a change of venue, might be necessary.[239] But silencing the prosecutors' speech in the first place is unwise absent the most unusual and compelling of circumstances.[240] Prosecutors' speech about ongoing cases "serves a valuable public function"[241] because "the subject of legal proceedings is often of direct significance in debate and deliberation over questions of public policy."[242] As the U.S. Supreme Court has explained, "it would be difficult to single out any aspect of government of higher . . . importance to the people than the manner in which criminal trials are conducted . . . ."[243] Likewise, Cassidy lauds prosecutors' public speech, because it keeps the public informed about prosecutors' use of scarce public resources and the choices they make about law enforcement priorities.[244] Prosecutors correspondingly have "a fiduciary obligation to apprise their constituents of how they are managing the public duties entrusted to them."[245] Prosecutors' media comments can also further public safety by warning of continuing dangers or against particularly vulnerable activities.[246] Moreover, "public statements by prosecutors may assist in ongoing investigations by encouraging other witnesses or victims to come forward with information" useful in catching and convicting criminals.[247] Finally, "public dissemination of a prosecutor's activities is necessary to fulfill the deterrent aims of the criminal law; unless the public is notified about indictments and convictions, other would-be perpetrators may not be appropriately dissuaded from engaging in criminal activity."[248]

There might, of course, be an argument made that prosecutors have a special ethical obligation to "do justice," requiring some degree of impartiality, open-mindedness, and avoidance of any bias against an accused as an individual that is akin to similar expectations of judges.[249]

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237. *See id.*
238. *See, e.g., id.* at 77–79.
239. *See id.* at 78–79.
240. *See id.*
241. *Id.* at 73.
242. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (1993).
243. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).
244. Cassidy, *supra* note 197, at 73.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *See id.* at 78–79 (making but implicitly rejecting such an argument); Levenson, *supra* note 173,

But prosecutors are also advocates,[250] and, argues Cassidy, even if they have some special obligation of impartiality, it must be less than that of judges.[251] Consequently, "the important lesson of *White* is that *if* there is a relevant distinction between judicial elections and legislative or executive elections, attorneys running for legislative or executive office . . . are entitled to *more* deference than judges, not less."[252] Accordingly, insists Cassidy, restrictions on prosecutors' speech should be analyzed under a strict scrutiny test that is as protective of their speech as it is in most other areas of First Amendment free speech law.[253]

I cannot accept Cassidy's argument wholesale. I think that he overvalues the ability of procedural remedies to rectify the dangers of prosecutor speech in high-profile cases and undervalues the harm to the reputation of the accused.[254] Less restrictive alternatives to silencing prosecutor speech thus may often not be available.

But Cassidy does identify legitimate goals of prosecutors in talking to the press, and he makes a more than plausible case that the Court would be fairly protective of a great deal prosecutor speech and of the need to be fair to the State, not only the accused, whatever standard of scrutiny the Court might apply.[255] Moreover, his argument suggests that the mere risk (not certainty) of harm to a fair trial may not necessarily settle the matter, given the *sometimes* legitimate free speech concerns that might outweigh even a substantial risk to trial fairness in a particular case. After all, all of life involves risks, so a cost-benefit analysis is always necessary. For the practical purposes of advising the Standards drafters, as the roundtables seek to do, these observations offer sufficient reason to be cautious about writing language that fails to allow for some case-specific justifications for prosecutors to speak for good reason.

At the same time, as discussed earlier, the dangers of prosecutor speech to trial fairness and to an accused's reputation are serious. Moreover, those same dangers can harm the public's ability to get accurate information and to critique fairly the information that is available, thus reducing substantially the theoretical free speech justifications for protecting the prosecutor's words. It is therefore not too much to expect prosecutors to advise the public of what they are doing in particular cases without aggravating the dangers to trial fairness and an accused's reputation that are already inherent in media coverage. Stifling

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at 1025 ("[W]hile prosecutors may have First Amendment rights, their responsibility to seek justice can trump those rights.").

250. *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 865–66.

251. Cassidy, *supra* note 197, at 79.

252. *Id.*

253. *See id.* at 71–73.

254. *See* discussion *supra* intro. & Part I.

255. *See generally* Cassidy, *supra* note 197 (supporting both these points).

important sources of media information, like the prosecutor, might sometimes lead to more speculation than accurate reporting, but the prosecutor does not further justice if he heightens the risk of trial unfairness when he can still serve the legitimate goals of communicating with the public.

CONCLUSION

Where does all this analysis lead us? I do not plan to answer this question in full or to suggest new language to replace that offered by the Task Force. In this brief Article, I cannot begin to accomplish that task. Moreover, if anything, the discussion here suggests humility in weighing conflicting concerns. Instead, particularly given that the Standards are meant to be aspirational rather than disciplinary rules, I offer a few principles that should guide the drafters in rethinking their product or, at the very least, prompt them to think about that product in a new light.

First, there is *always* a "substantial risk" to a fair trial in media communications in a high-profile case. That risk-based language might have the U.S. Supreme Court's approval as consistent with constitutional free speech principles *if* accompanied by language giving lawyers clearer guidance on how to comply with the mandate. But the language denies reality and serves merely to avoid the more difficult question of what speech to permit, given the unavoidable existence of trial fairness risks.

Second, the media will raise risks to trial fairness no matter what the prosecutor says or does not say. But, given the prosecutor's duty to do justice and the high importance of the right to a fair trial, the prosecutor should follow a principle of nonaggravation: make no statement having the potential of aggravating the existing substantial risks to trial fairness. That is admittedly hard to judge in some instances, so the prosecutor should err on the side of minimizing statements made. Here are some guidelines: Prosecutor press statements should not reveal inadmissible evidence (or even evidence whose admissibility is in doubt) as such statements undermine the primary reason for having an evidence code, namely, to ensure that adversarial combat promotes sound, rather than unsound, decisionmaking. Nor should a prosecutor address the "poison pills," such as comments about the accused's character,[256] known to raise especially grave dangers to trial fairness. Moreover, perhaps the greatest danger of an unfair trial is that of convicting the innocent. A prosecutor should avoid revealing any matters posing a real risk of that outcome. This is not guesswork; ample social science identifies these risks with great specificity.[257]

256. *See supra* text accompanying notes 194–96.

257. *See* Levenson, *supra* note 173, at 1042–52.

Third, the Standard should urge ethics authorities to draft rules that include precise lists of "thou shall nots" *in the rule text*, not simply in commentary, precisely because of the difficulty of some of the judgments prosecutors must make.[258] Those "thou shall nots" should be more expansive than the current list in the commentary to Model Rule of Professional Conduct 3.6 and should include all types of statements that heighten the risk of convicting the innocent and those that even indirectly allude to racial appeals or stereotyping, as Professor Levenson has argued.[259] Racial appeals are particularly damaging to the actuality and appearance of trial fairness, including trial accuracy.[260] Moreover, they impose reputational costs on entire groups, not merely the accused, a consequence that is never justifiable.[261]

Fourth, prosecutors should studiously avoid *any* pretrial statements that could be read as disparaging the accused's reputation precisely because the defendant is, at that point, merely *the accused.* A criminal defendant is not deserving of any attack on his honor at that stage of the proceedings, no matter how much an angry electorate might crave it.

Fifth, when prosecutors do speak, they should generally limit their speech either to describing their actions (or inactions) and the reasons for taking them or to seeking to protect public safety. Examples of statements protecting public safety would include revealing that an accused cannot be found or seeking to encourage witnesses to come forward. All these prosecutor statements should be stated in a manner consistent with the first four principles noted above. These sorts of statements are adequate to convey to the public the information it most needs to make judgments about how good a job the prosecutor is doing and otherwise to achieve the goals of prosecutor-as-eternal-political-candidate speech that Professor Cassidy outlines.

Finally, a prosecutor should be free to respond to inaccurate defense or media statements. This right of response has the potential to swallow all other restrictions, yet concerns about reciprocity,[262] protecting trial fairness, and accurately informing the public suggest that a responsiveness right is wise so long as it is used sparingly, modestly, and accurately. One way to promote these goals is to require a prosecutor to issue a written statement, to be publicly filed with ethics authorities within a specified amount of time after making the statement, justifying why the prosecutor felt the need for responsive speech. Ample social science suggests that the mere need to justify your actions to others acts

258. *See id.* at 1042–55, 1060 (making these arguments and suggesting clear rules).

259. *See id.*

260. *See id.* at 1038–42.

261. Taslitz, *supra* note 54, at 403–06.

262. *See* Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. (forthcoming 2011) (manuscript at 9–21) (explaining the morality and psychology of reciprocity, albeit in the context of corporate versus individual criminal liability).

as a restraint on inaccurate and excessive behavior.[263] Repeated prosecutor training, including role playing, is also wise to avoid errors arising from simple ignorance or incompetence.[264]

Prosecutors serve important and complex social roles. They deserve ethics rules that are fair to them as well as to other actors in the justice system. But such rules must be realistic, candid about the difficulty of weighing competing concerns, and attentive to clear guidance and institutional devices for creating incentives to get the balance right. I hope that this Article helps to contribute to the dialogue surrounding how best to achieve those goals.

263. *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 32–33, 64–68 (2010).

264. *See generally* Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 271 (2006) (discussing training's importance).